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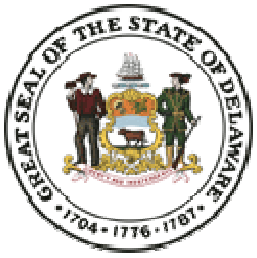

COMPENDIUM OF RECENT CRIMINAL-LAW DECISIONS FROM THE DELAWARE SUPREME COURT

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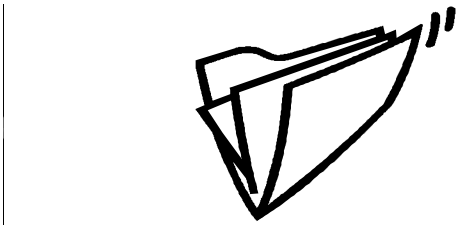
DELAWARE SUPREME COURT CASES
APRIL 1, 2010 THROUGH JUNE 30, 2010

LINDALE V. STATE (4/19/2010): §3507 FOUNDATION & REDACTIONS

D was convicted of two counts of unlawful sexual conduct. His convictions were based in large part on an interview of the 7-year-old V by the Child Advocacy Center (CAC). A video of the interview was admitted into evidence under §3507. At trial D asked the court to redact 1) the naming and drawing of anatomical parts, 2) a discussion about "good touch/bad touch", and 3) a safety message instructing V that "Look, I hope nothing like this happens again, but if it does you must tell someone right away, ok?" The trial court denied D's motions.

On appeal, D claimed that the 3507 video was inadmissible for lack of foundation. However, the Court ruled that V properly testified that: she gave a statement to the interviewer, no one made her talk to him, she told him the truth, her statement pertained to D's alleged conduct. Also, the Court ruled that the trial court did not abuse its discretion in permitting statements 1 & 2. While they were superfluous, there was no prejudice. The words in the safety message "indirectly vouched for [V's] credibility," were inadmissible. The trial court's error in permitting this statement was harmless. AFFIRMED.

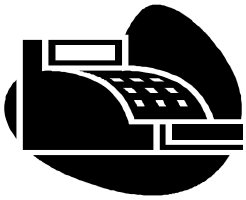
JOHNSON V. STATE (5/10/2010): SENTENCE MODIFICATION



D appealed the trial court's denial of his Motion for Modification of Sentence. D argued that his sentence was disproportionate to those of his codefendants who engaged in the same conduct. He also claimed that the trial court based its decision on the pre-sentence report which contained unreliable information.

The Court stated that it will not "find error of law or abuse of discretion unless it is clear from the record below that a sentence has been imposed on the basis of demonstrably false information or information lacking a minimal indicium of reliability." Here, the pre-sentence report consisted almost entirely of D's prior criminal record, numerous police reports detailing investigations and an evaluation by the presentence officer. These were found to be "sufficiently reliable to withstand review." With respect to D's length of sentence in relation to those of his co-defendants, the Court ruled that it did not "lead to an inference of gross disproportionality." AFFIRMED.

RAMSEY V. STATE (5/26/2010): LIO's IN BENCH TRIALS/ PARTY AUTONOMY RULE



D and his co-d went into a pizza restaurant and took money out of the register while V stood by. D argued that at best V was "menaced" and not robbed. The trial court withheld decision on that issue. At the conclusion of a bench trial, the judge convicted D of Attempted First Degree Robbery along with several other offenses. However, neither D nor the State requested a lesser included offense of Attempted Robbery First Degree. On appeal, the Court held that the "party autonomy rule", which places the burden on the *parties* to decide whether the lesser-included offense should be considered by the jury, also applies to bench trials. The parties must explicitly or affirmatively request the court to *actually* consider that lesser-included offense.

For future reference, the Court encouraged the Superior Court to hold "a conference before the parties make their closing statements in such trials, where the parties will be afforded the opportunity to request that the trial judge consider relevant lesser-included offenses. A party's failure to request adjudication of a lesser-included offense during that conference will be deemed knowing and intentional." REVERSED.

HARRIS V. STATE (4/6/10): TAMPERING WITH EVIDENCE/ LIDAR MEASUREMENTS/ "CHURCH"

P noticed a car with foggy windows idling in a parking lot. P tapped on the window then smelled marijuana. D was ordered out of the car. His speech was muffled and there was plastic in his mouth. P initially refused to spit out the plastic when ordered to do so. However, he did eventually comply. D spit out a plastic bag containing 0.55 grams of marijuana. The officers then measured the distance from the car to a nearby church at 165' using LIDAR. D was later convicted of Possession of a Controlled Substance within 300' of a Church and Tampering with Evidence.

On appeal, D argued that the trial judge: erred when it denied his motion for judgment of acquittal on the tampering and Possession Within 300' of a Church; and abused his discretion by admitting the LIDAR measurement. The Court held the LIDAR measurement was admissible because testimony established: the officer's qualifications; and the machine's proper calibration and function. The Court further held the State presented sufficient evidence to establish the building at issue was a "church" under 10 *Del. C.* § 4768(a) as proof is not required that religious services are regularly conducted.

The Court also concluded that Tampering with Evidence, 11 *Del. C.* § 1269, criminalizes successful suppression of evidence, not merely attempted suppression. An "item" does not become "evidence" until control over the item or constructive control over the premises has been exercised by P. Until P exercise such control, D may have no reason to believe the item is "about to" be used as evidence. Here, because the bag in D's mouth was visible to P and his muffled speech audible, there was no suppression, the item was "immediately retrievable" by P. REVERSED IN PART/AFFIRMED IN PART.

CONCURRANCE: Tampering should be reversed only because State did not ask for an "attempt" charge and failed to prove elements of indictment which included "destruction."

DAWKINS V. STATE, (4/28/10): RESENTENCING

D pled to Assault 3 and was sentenced to 1 year Level V, suspended for 1 year Level III probation. D then violated his probation and was resentenced to 9 months Level V. On appeal, D claimed: his VOP sentence was "harsh" and inappropriate; the sentencing judge was unfair and biased; and he had not been properly credited for Level V time served. D requested his sentence be reduced to 60 or 90 days.

The Supreme Court explained that once a D commits a VOP, the trial court has the authority to sentence him to the remainder of his original sentence or any lesser sentence. However, D must be given credit for all Level V time served.

Before his original conviction, D was held in default of bail for 2 months. D received a 1 year suspended sentence. As a result, D could be sentenced on his violation to up to 10 months at Level V. Thus, the imposed 9-month sentence was legal. D's claim of judicial bias was not reviewed because he failed to attach portions of the transcript. AFFIRMED.

PAGE V. STATE, (5/11/10):

D was convicted of three counts of Murder First Degree and related offenses. His convictions and sentences were affirmed on direct appeal. D then filed a Rule 61 motion. When this was denied, D moved for reconsideration because he was never provided copies of his attorney's affidavits or given an opportunity to respond. This also was denied. On appeal, the Delaware Supreme Court remanded to allow D to respond. D's motion was denied again.

On appeal, D raised 4 arguments: the trial court improperly denied his motion for post conviction relief because counsel should not have accepted the case knowing it would be delayed; the trial court erred in denying leave to expand the record on 6th Amendment public trial claim; the failure of trial counsel to protect the record constitutes ineffective assistance of counsel; and if the matter was remanded, a new trial judge should be assigned.

The Court found that counsel acted reasonably in accepting and retaining his case despite the fact that the trial would not be conducted within a year of the offense as contemplated by Administrative Directive No. 88 because counsel explained this to D at the outset. As a result, D also waived his speedy trial claim. Even if counsel's conduct was unreasonable, D failed to establish prejudice, and none of the circumstances fell within the ambit of those set forth in *U.S. v. Cronic* that do not require a showing of prejudice.

The Court further found that there was no abuse of discretion in finding that D was not coerced into sacrificing his right to a speedy trial by lack of funding for experts because D voluntarily waived that right for his own benefit. Further, there was no abuse of discretion related to the *voir dire* proceeding or the denial to expand the record because the findings of the Superior Court were supported by the record. As such, the Court found D's counsel was not ineffective. AFFIRMED.

MILLER V. STATE, (6/7/10): PROBABLE CAUSE FOR BLOOD ALCOHOL TEST

D crashed her car into another at a red light. The responding officer noticed a strong odor of alcohol on D's breath and eyes that were glassy/watery. D said she drank 2 beers 2 hours earlier. P administered a variety of field sobriety tests. D successfully recited the alphabet, counted backwards and completed the finger-to-nose test. D failed the horizontal gaze, walk-and-turn and one-legged-stand tests. She then failed the portable breath test (PBT). P charged her with DUI and Following Too Closely.

D filed a motion to suppress, arguing P lacked probable cause to administer a breath test and arrest her. After a hearing, the judge ruled that, based on the totality of the circumstances, (which included the time of day, nature of the accident, odor of alcohol, D's watery eyes, admission to drinking and failure of some field tests), P had probable cause to administer the blood alcohol test.

On appeal, the Court agreed with D that the judge should not have considered the PBT in the probable cause analysis because the State failed to establish that P had the

proper qualifications and properly calibrated the machine. The admission of the HGN field sobriety test was an abuse of discretion because P did not testify about the NHTSA standards or that he complied with them. Finally, consideration of the field sobriety tests was not an abuse of discretion because D informed P of physical limitations only after she failed the tests. Ultimately, the Court held that, even without the PBT and HGN, there was probable cause to conduct the blood alcohol test. AFFIRMED.

SMITH V. STATE, (5/26/10): RIGHT TO SELF REPRESENTATION

D was accused of assaulting a woman and their children. After opening statements, an issue arose between D and his counsel regarding his representation. D wanted to proceed on his own. The judge informed him that he would be held to the court's procedures without assistance from the court, and that in most instances in which a person represents himself, he is convicted. D still chose to proceed, even after the trial judge insisted that he think it over because he felt D's actions in the courtroom were detrimental to his rapport with the jury. D was convicted for aggravated menacing, assault in the second degree, weapon and related offenses.

On appeal, D argued that the record did not establish that he knowingly, intelligently, and voluntarily waived his constitutional right to counsel before being permitted to proceed *pro se* at trial. The Court reviewed the case *de novo* and using the guidelines and factors set forth in *Briscoe v. State*, 606 A.2d 103 (Del. 1992), it was determined that the trial judge did not conduct a proper searching inquiry into waiver of counsel because not all of the *Briscoe* factors were addressed and the answers given were not responsive. It was the judge's responsibility to ensure D was adequately advised of the dangers of self-representation before he could knowingly and intelligently waive his Sixth Amendment right to counsel. REVERSED and REMANDED.

DIXON V. STATE, (5/20/10): EXCITED UTTERANCE/RIGHT TO CONFRONTATION

Based primarily on the content of a 911 call, D was convicted of assault 1ST, reckless endangering 1ST, possession of a firearm during the commission of a felony, and possession of a deadly weapon by a person prohibited. The call contained a report of an incident that had happened minutes earlier and contained, at least arguably, a lot of editorializing.

On appeal, D argued that the judge erred by allowing the introduction of this call as an excited utterance under *D.R.E.* 803(2). D also argued that admission of the call violated his 6th Amendment right to confrontation pursuant to *Crawford v. Washington* because the statements were testimonial in nature. The Court concluded that the caller's statements were admissible as "excited utterances" because: excitement was precipitated by an event; they were made during the time the excitement was continuing; and were related to startling event. The Court also determined that the judge properly relied on the holding in *Davis v. Washington*, the statements were not testimonial and thus, did not violate D's rights 6th Amendment rights. Even if some portions of the statements made in the 911 call were testimonial, their admission was harmless beyond a reasonable doubt because V identified D as his assailant and bullets that matched those used in the shooting were recovered when D was arrested. AFFIRMED.

VELASQUEZ V. STATE, (4/27/10): PLEA WITHDRAWAL

D entered a *nolo contendre* plea to one count of rape in the second degree. He is Spanish-speaking and filled out his TIS form in Spanish. After being sentenced, he filed a *pro se* motion for modification, which was denied. D then filed a post-conviction motion claiming that "he was not properly advised of the nature of the minimum sentence" and because the guilty plea form did not indicate that there was a minimum-mandatory sentence, his plea was not knowing and voluntary. The judge altered the sentence order, removing the "minimum mandatory" language, but retained the minimum sentence of ten years because it was a minimum sentence pursuant to statute. The remainder of D's motion was denied. On appeal, the Court remanded where the Superior Court concluded that D's plea was entered knowingly, voluntarily, and intelligently.

D appealed again and the Court determined as a matter of fact that D knew there was a minimum sentence of ten years. The judge was entitled to rely upon D's answers during the hearing and both the plea agreement and TIS form had a sentencing range of ten to twenty-five years clearly written on them. D signed both of these documents. Additionally, the judge told D his sentence would "start at ten years." The Court held that the judge did not abuse his discretion when he denied D's post-conviction motion. AFFIRMED.

COOPER V. STATE (4/12/10): DELAYED *BRADY* DISCLOSURE

In recorded statements to the police, W1 claimed D confessed to the attempted murder and related offenses of which D was later convicted. W1 was not revealed to D

until P's opening statement. On the first day of the trial, D was given only police summaries of W1's statements. The trial court ruled there was no *Brady* issue, but advised the prosecution to release W1's statements. The trial court also offered D more time to prepare for cross-examination. D declined. Regarding a different case involving D, W2 testified that he heard the co-D wanted to "make a deal". D's objection on hearsay grounds was sustained.

On appeal, D argued that the trial court erred under *Brady*, because the State did not timely disclose 1) W1's pre-recorded statements 2) W1's criminal record, or 3) co-D's agreement with police. *Brady* requires reversal if hidden exculpatory or impeaching evidence prejudices the outcome of the trial, i.e. materially affects a determination of guilt or punishment, and undermines confidence in the trial. The Court held that since D had an opportunity to prepare for cross-examination, any delayed disclosure of the evidence was not prejudicial. Also, while co-D's agreement with the police might have been used to impeach W2, it was not material to the case. Thus, the Court reasoned it was too remote this case to undermine confidence in the trial. AFFIRMED.

SNEAD v. STATE, (5/4/10): SENTENCE CREDIT/BOOT CAMP/ §6712 PROBATIONARY PERIODS

D entered a plea and was sentenced on trafficking to 8 years at Level V, suspended after 3 years, for 5 years at Level III. He received Boot Camp on a PWITD charge and was told if he violated on that sentence he would have to serve 5 years. D served the 3 years for trafficking and completed Boot Camp. He then violated his probation and was sentenced to Boot Camp Tune-Up. D violated his probation again, and the court vacated the Boot Camp sentence for 5 years at Level V. D moved for correction of sentence which was denied.

On appeal, D argued that the court should have only been able to sentence him to 3 years at Level V, because that was the total amount of time he had been given for Boot Camp and probation. The Court rejected this argument, reasoning that the Del. Statute governing Boot Camp Diversion sentences requires the court to not give credit for Boot Camp, Level IV or Level III time served.

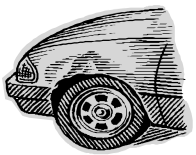
D argued further that Del. Code Ann. tit. 11, §6712(d)(1) fixed his maximum probationary sentence at 1½ years. The Court rejected this argument as well, reasoning that D would need to have applied to the court to reduce his probationary period under §6712, and therefore was not entitled to this maximum probationary period under the statute. AFFIRMED.

FOREMAN V. STATE, (5/11/10): SENTENCING FACTORS

D pled to PWITD and P agreed to dismiss pending VOP's and to petition under 4214 (a) rather than 4214(b) to have him declared habitual. At sentencing, the court identified four aggravating factors: 1) need for correctional treatment; 2) custody status at time of offense; 3) habitual status; and 4) repetitive criminal conduct. The judge also made a comment regarding the drug enterprise that his family was involved in. He then sentenced D to 15 years at Level V.

On appeal, D argued that it was impermissible to sentence him based upon the criminal conduct of his family. The Court stated that a judge has broad discretion to consider facts about D's personal history, not confined to conduct for which D is being sentenced. Here, there was no express connection to the family tie and the sentence in the lower court's statements. There was a "logical and conscientious process" arriving at the sentence through the aggravating factors mentioned in SENTAC. AFFIRMED.

VINCENT V. STATE, (6/1/10): TAMPERING W/WITNESS/ CIRCUMSTANTIAL EVIDENCE



W lived with V and occasionally used her car. D lived in the same neighborhood. V was scheduled to testify against D in court. One night, D and V had an argument. V left and said, "I'll see you in court." An hour later, W heard a thump outside her home and found a dent in her car. Later the same evening, W heard another thump, looked out her window and again saw the D near her car. W went outside and found a new dent in the car. D was charged with tampering with a witness by damage to property and criminal mischief. The trial court denied D's motions for judgment of acquittal.

On appeal, the Court concluded that the circumstantial evidence presented at trial was sufficient for a rational trier of fact to conclude that D was the one who dented the car. W's testimony placed D at the scene as the only person there, and because D's presence corresponded with the new dent. However, the Court reversed the tampering conviction because there was insufficient evidence that the damage was done to property in which the witness has an interest. Here, V did not own the property, but only had "limited specific permissive use". The Court noted that the legislature could have written the section differently if it wanted a more expansive definition of property.
AFFIRMED in part/REVERSED in part.

FOREHAND V. STATE, 6/22/10: HABITUAL OFFENDER/ ESCAPE AFTER CONVICTION

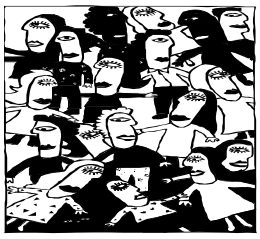
D was serving a Level IV sentence on work release. One day, he failed to return to the Plummer Center after work. He was arrested a week later. D pled guilty to Escape After Conviction and was sentenced as an habitual offender to a minimum-mandatory term of 8 years at Level V.

Under § 4214 (a), a person with 3 prior felony convictions may be declared an habitual offender after committing a 4th felony. The maximum sentence is life imprisonment, and, if the 4th felony is a violent one, as defined in § 4201 (c), the minimum sentence may not be less than the maximum sentence for that crime. Escape After Conviction is one of the 75 enumerated "violent felonies."

On appeal D argued first that the "violent felony" section of the statute is unconstitutional because there is no rational basis for calling a "walkaway" escape after conviction a violent felony. The Court rejected his argument, saying that the listed felonies do not always involve violence, but they are dangerous crimes that place innocent people at risk of harm. The Court also rejected D's argument that his sentence was disproportionate, noting that he remained at large until the police arrested him one week later. While an eight-year sentence may be harsh, it does not approach the grossly disproportionate standard required for Eighth Amendment protection. AFFIRMED.

DISSENT: two justices found the definition of violent felonies to be overbroad and would have reversed.

MOORE V. STATE, 6/8/10: PEDESTRIAN STOP/COMMUNITY CARETAKER DOCTRINE



Officer responded to a report of a melee at an intersection in New Castle which involved several black women and men and resulted in a stabbing and shots fired. The officer drove about 1,000 yards passed the scene and saw D, a black male, and his friend, another black male, walking on the side of the road. According to the officer, from behind she could see one man with his hands near his abdomen and other with his hands in his pockets. The officer put on her flashing lights drove passed the men, spun around and pulled up in front of them. She immediately realized that neither of the men were a stabbing victim, but she went into "officer safety mode," got out of the car and seized the

men by ordering them to show her their hands. Later, an ammunition magazine and pistol were found on D. He was convicted of PDWBPP and CCDW.

On appeal, D argued that when the officer arrested him, she lacked reasonable and articulable suspicion that he may have been involved in criminal activity and that the evidence obtained as a result should have been suppressed. Even though the State never raised the argument below or on appeal, the Court *sua sponte* ruled that the initial stop was valid under the community caretaker doctrine, because the officer believed one of the men may have been the stabbing victim. Thus, the initial stop did not require reasonable suspicion of criminal activity. However, once the officer realized there was no stabbing victim, a continued stop did require reasonable suspicion. The Court concluded that under the circumstances, the officer had the requisite suspicion to stop and frisk D because he was fidgeting with his waist and that made it appear as though he was concealing a weapon. Additionally, there had very recently been criminal activity involving a weapon in the general area. AFFIRMED.

ERSKINE V. STATE, 6/24/10: ACCOMPLICE LIABILITY/IMPROPER COMMENTS

D and Co-D spent the day driving around, drinking heavily and looking for drugs. At one point, they picked up a couple of drug dealers who claimed to be able to get them some drugs. They stopped at one location where the dealers got out and a crowd began to surround the truck. Somehow, D and Co-D got away with the dealers back in the truck. Later, Co-D1 picked up his friend Co-D2 while D was still in the truck. Co-D1 had told Co-D2 that the dealers had attempted to have them robbed. Subsequently, Co-D2 picked up the shotgun that was in the truck and shot V1 and V2 in the face and head, respectively. Co-D2 was dropped off and per his orders, Co-D1 took D with him to dispose of the bodies. At one point, it was discovered that V2 was still alive. So, before burying him in a make-shift grave, D handed Co-D1 a knife to "finish him off." Co-D1 later pled to Murder 2. D went to trial and presented an expert to testify that D had acted under duress when he gave his knife to Co-D1 and him to finish V2 off. D was convicted under accomplice liability to Murder 1.

The first issue D raised on appeal was that the trial court erred in failing to give complete jury instructions on accomplice liability. Specifically, the court did not give a "§ 274 instruction" *sua sponte*. Section 274 says that if two or more people are liable for "an offense which is divided into degrees, each person is guilty of an offense of such degree as is compatible with that person's own culpable mental state and with that person's own accountability for an aggravating fact or circumstance." The Court ruled that there was no error in failing to give a § 274 instruction because D's conduct could not be anything but intentional, and therefore there was no rational basis for giving the instruction.

D also argued that the prosecutor made improper comments during his rebuttal when he told the jury that D's expert had been "bought and paid for." While the judge did provide a curative instruction, D claimed that it was inadequate because it was given

a day after the closing arguments and because it did not refer to other improper comments. The Court found the statements to be prejoritive and intended to give the prosecutor's belief that the expert was not providing a professionally supported opinion. However, the Court rejected D's claims because a curative instruction is generally enough to redress any prejudice to D and because the comment was not part of a pattern of persistent misconduct. AFFIRMED.